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Constructing Evidence and Educating Juries: The Case for Modular, Made-In-Advance Expert Evidence About Eyewitness Identifications and False Confessions

Jennifer L. Mnookin^{*}

Over the last several decades, research psychologists have entered the courtroom with increasing frequency to testify on behalf of criminal defendants. Their role has primarily been to show how social-science evidence complicates the conventional wisdom about certain kinds of critical and often-used evidence. These witnesses challenge, and sometimes even debunk, commonsense views about categories of evidence that juries tend, on the whole, to find very persuasive, like eyewitness identification testimony and even that so-called “queen of proofs,” the confession.¹ These experts educate judges and juries about the substantial body of research that shows, for example, that eyewitnesses—even those who have a great deal of genuine confidence about their own accuracy—are sometimes mistaken when they identify someone as the perpetrator.² They teach the fact finders

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1. As John Langbein wrote, “[t]he maxim of the medieval Glossators . . . aptly describes American law: *confessio est regina probationum*, confession is the queen of proof.” John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 14 (1978).

2. The psychological literature on eyewitness identification is voluminous. For a recent effort to canvas and evaluate the field, see NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 108 (2014) [hereinafter IDENTIFYING THE CULPRIT], noting that “self-reported confidence at the time of trial is not a reliable predictor of eyewitness accuracy.” For other overviews of the social-science findings in the area, see generally BRIAN L. CUTLER & MARGARET BULL KOVERA, EVALUATING EYEWITNESS IDENTIFICATION (2010), identifying best practices for evaluating eyewitness testimony and guidelines for interactions between attorneys and expert witnesses; BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW (1995), evaluating the effectiveness of mechanisms meant to safeguard defendants from faulty eyewitness testimony by reviewing empirical research, finding that official safeguards are less effective than expert psychological testimony educating jurors on the frailties of eyewitness memory; JAMES MICHAEL LAMPINEN, JEFFREY S. NEUSCHATZ & ANDREW D. CLING, THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION (2012), chronicling the variables that impact

that memory operates not at all like a point-and-shoot camera; rather, honestly held beliefs about what a witness claims to have seen or experienced may be distorted, inaccurate, or even completely wrong.³ They describe the dangers of certain lineup procedures that may increase the chances that a witness makes an erroneous identification.⁴ They describe the reality, surprising to many, that innocent suspects under interrogation by the police sometimes really do confess to crimes in which they actually played no role at all.⁵

The judicial reception of these forms of psychological evidence has been stuttering and somewhat rocky, but overall it is fair to say that there is growing acceptance of the legitimacy of these kinds of expertise. In fact, a number of courts have held that when an eyewitness identification by a stranger is at the heart of the prosecutor's case, the trial court's exclusion of a qualified defense expert who could have educated the jury about relevant social-science findings about the danger of mistaken identifications can even be reversible error.⁶ Courts in recent years have shown increasing

the accuracy of eyewitness identifications and describing the beneficial effects of expert testimony offered to educate juries about questionable eyewitness statements; and ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1979), creating a framework that examines empirical studies relating to eyewitness testimony and explaining how eyewitness testimony has impacted the American legal system.

3. See, e.g., IDENTIFYING THE CULPRIT, *supra* note 2, at 69–70 (concluding that “[m]emory is often far from a faithful record of what was perceived, . . . its contents can be forgotten or contaminated at multiple stages, it can be biased by the very practices designed to elicit recall, and it is heavily swayed by emotional states”). See generally sources cited *supra* note 2.

4. See, e.g., United States v. Brownlee, 454 F.3d 131, 138 (3d Cir. 2006) (noting the inherently suggestive nature of lineup procedures that can induce witnesses to make unreliable identifications); IDENTIFYING THE CULPRIT, *supra* note 2, at 106–07 (recommending the use of double-blind methods in lineups and photo arrays to avoid bias inadvertently suggested by the administrator).

5. See, e.g., BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 7–8, 14–44 (2011) (discussing expert testimony in the context of false confessions and explaining that some 16% of exonerees studied gave false confessions in response to police interrogation, often even incorporating details of the crime likely provided to them by the police); G. Daniel Lassiter et al., *Introduction: Police Interrogations and False Confessions—An Overview*, in POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 3, 4–5 (G. Daniel Lassiter & Christian A. Meissner eds., 2010) (summarizing studies indicating that common procedural errors of interrogations can result in false confessions); DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 121 (2012) (noting that false confessions “have been observed in 15–25 percent of the known exonerations”); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 933–43 (2004) (presenting a collection of examples of interrogation-induced false confessions, including an extensive list of specific, proven false confessions).

6. For one of the earliest such cases, see *State v. Chapple*, 660 P.2d 1208, 1223–24 (Ariz. 1983). Other cases finding exclusion to be error (often depending on quite fact-specific dimensions of the case, such as the centrality of the identification to the prosecution's case coupled with little corroborating evidence or the existence of a cross-racial identification) include *Brownlee*, 454 F.3d at 144; *People v. McDonald*, 690 P.2d 709, 727 (Cal. 1984); *State v. Guilbert*, 49 A.3d 705, 729 (Conn. 2012); *Benn v. United States*, 978 A.2d 1257, 1275 (D.C. 2009);

concern and interest in the problem of unduly suggestive lineup procedures as well.⁷ For false-confession evidence, the trend line remains somewhat more uneven; while some courts do continue to exclude the evidence, often on the grounds that it is unnecessary or invades the province of the jury (by indirectly opining on credibility), many others do permit such expertise.⁸

The recent increased focus on and knowledge about wrongful convictions have spotlighted the importance of these kinds of psychological evidence. The rise of DNA evidence and the concomitant Innocence Movement have exposed the significant dangers of erroneous eyewitness identifications and false confessions, among other kinds of evidence. In a close look at the first several hundred DNA exonerations, Brandon Garrett found that around three-quarters of the cases involved some form of mistaken eyewitness identification.⁹ False confessions were less commonplace but still far from rare, appearing in nearly one-sixth of the cases he examined.¹⁰

This prevalence of mistaken eyewitness identifications and false confessions among known wrongful convictions strongly suggests that fact finders sometimes risk overvaluing or misinterpreting these kinds of evidence. By educating the jury about social-science research, expert psychological evidence may give the jury better tools for assessing probative value more accurately. Teaching about risk factors for erroneous identification or mistaken confession may enable savvier assessment of these kinds of proof in the particular case—and helping fact finders to assess these kinds of evidence with an informed, critical eye may even help reduce wrongful convictions.

That said, expert psychological evidence is only one possible method among several for attempting to reduce wrongful convictions based on erroneous eyewitness identification or inaccurate and false confessions. Moreover, realistically it is simply not an approach that can feasibly be used in the very large number of cases in which these forms of evidence play a starring role. Experts are simply too few in number and too expensive to be able to be called in as many cases as they would have meaningful relevance. Given their cost and scarcity, psychological experts are inevitably going to be a “couture” approach to evidence, available only when either a defendant

Stephenson v. State, 226 S.W.3d 622, 627 (Tex. App.—Amarillo 2007, no pet.); and *State v. Clopten*, 223 P.3d 1103, 1115 (Utah 2009).

7. See, e.g., *State v. Henderson*, 27 A.3d 872, 897–902 (N.J. 2011) (discussing various lineup procedures); *State v. Lawson*, 291 P.3d 673, 686–88 (Or. 2012) (en banc) (same).

8. See, e.g., *United States v. Adams*, 271 F.3d 1236, 1246 (10th Cir. 2001) (holding that trial judge acted within his discretion in disallowing expert testimony); *Miller v. State*, 770 N.E.2d 763, 773–74 (Ind. 2002) (holding exclusion of expert testimony to be reversible error).

9. See GARRETT, *supra* note 5, at 48 (reporting eyewitness misidentifications in 190 of 250 cases).

10. *Id.* at 18 (noting false confessions in 40 out of 250 cases). See also SIMON, *supra* note 5, at 121 (noting multiple cases and studies documenting instances of false confessions).

has means or a judge can be persuaded to provide funding for this purpose.¹¹ This individualized, custom, haute couture approach cannot in its current form be transformed into a ready-to-wear alternative that could be used in the great mass of cases; by its nature, it does not easily scale.

In this Article, I want to suggest a method by which we could, in fact, transform this couture approach into a ready-to-wear alternative, accessible by far more defendants for very little cost. Specifically, I want to argue that a credible, nonpartisan, well-respected organization (or multiple organizations partnering together) should spearhead and oversee the creation of premade, canned, modular testimony on these topics. These made-in-advance modules could, at the defendant's election, be introduced as a form of testimony to teach a fact finder about what research psychology shows about relevant aspects of eyewitness identification, or the operation of memory, or lineup procedures, or false confessions.

Such an approach is, I admit, unusual. Testimony in our adjudicatory system is typically understood as something case specific, as an individual testifying live and in person, face-to-face before a fact finder. I am instead proposing a kind of testimony that would be produced in advance of any given trial and that could be used and reused whenever appropriate in the many different trials in which the same social-science related issues recur.

I first suggested the possibility of this kind of “repeat-play” modular testimony in a forthcoming piece in a symposium in honor of the great—and often maverick—trial judge Jack Weinstein.¹² In that article, I put forward the idea of modular testimony for certain, limited kinds of expert evidence as one of two possible evidentiary innovations I proposed that linked to aggregation, technology, and justice.¹³ In that piece, I presented an overview of both ideas as “‘objects to think with’; as ideas to spark our collective evidentiary imagination and encourage us to think expansively about how we might improve the quality of information to which juries have access . . . in the interest of enhancing the fairness and accuracy of our adversarial process.”¹⁴

In this Article, I want to compare this idea of modular testimony to several alternative methods for trying to reduce the dangers of inaccurate

11. See, e.g., *Ake v. Oklahoma*, 470 U.S. 68, 72, 86–87 (1985) (determining that a defendant has a due process right to the assistance of a psychiatrist for the determination of sanity but leaving open the extent to which this due process right requires courts to fund other kinds of expert assistance helpful to mounting a defense). In practice, there is a great deal of judicial discretion regarding the funding of experts for indigent defendants. See Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305, 1312–13 (2004) (noting that judges have the ability to restrict or deny funding for defense experts).

12. Jennifer L. Mnookin, *Repeat-Play Evidence: Jack Weinstein, “Pedagogical Devices,” Technology, and Evidence*, 64 DEPAUL L. REV. (forthcoming 2015).

13. *Id.*

14. *Id.* (citations omitted).

eyewitness identifications and false confessions. Specifically, I will look at the possibility of having judges assess the reliability of these kinds of evidence directly, and I will also assess the viability of using expanded jury instructions as an educational device. I will argue that modular, repeat-play evidence is conceptually preferable to jury instructions and more institutionally appropriate than a strong version of a substantive reliability assessment by the court. On the question of whether modular, made-in-advance expert testimony it is a better approach than using a traditional expert witness, I am more equivocal. There are both gains and potential losses to replacing a live expert with a set of prerecorded modules—but realistically, the use of live expert witnesses in these cases is, like the bespoke suit, a rarity. Therefore, at a minimum, modular testimony offers a potential second-best solution that would permit the content of expert testimony to be used in a far larger number of cases in which they are relevant.

As we shall see, the current doctrines for the judicial evaluation of these kinds of evidence invoke reliability considerations around the edges, but in fact hardly regulate them at all. By contrast, for scientific and expert evidence *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁵ and its progeny have required judges to play an active gatekeeping role, assessing validity and reliability in order to determine admissibility.¹⁶ Some have suggested a similar gatekeeping role for judges vis-à-vis these other kinds of evidence as well. I will suggest, however, that judges usually do not in fact have a legitimate basis for determining reliability in a given instance; while we do have significant social-science knowledge about these areas, that knowledge does not translate into a validated method for diagnosing the accuracy of a particular identification or confession.

Jury instructions offer another alternative for reducing the dangers of eyewitness misidentification or wrongful confessions. In fact, several jurisdictions, most notably New Jersey, have invested substantial energy in the production of social-science-based jury instructions, particularly about the social-science research on eyewitness identifications, to be used as a far lower cost alternative to experts in appropriate cases. But this use of instructions, while an understandable and well-intentioned response to the importance of the issue and the practical reality that not every deserving defendant will be able to call an expert, is, I suggest, a wrong turn. They are, in a way, a category mistake: an effort to turn something that is fundamentally *evidence* into an appropriate topic for judicial instruction.

This category mistake, however, does reflect something important and relatively unusual about these kinds of evidence. At least a significant

15. 509 U.S. 579 (1993).

16. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

part—and perhaps virtually all—of the value offered by these kinds of experts is simply not case specific. These social-science experts are describing the state of a field, the findings of experiments, and what is known and understood about circumstances or risk factors that make, for example, faulty identifications or false confessions more likely.¹⁷ It is this quality—which we could call “framework” evidence,¹⁸ or meta-expertise,¹⁹ or instructional or educational expertise,²⁰ or even legislative facts²¹—that makes jury instructions a tempting, if problematic, direction in which to head. And it is precisely this same quality that makes modular, premade testimony a plausible alternative to our traditional, particularized, case-by-case use of an expert.

In what follows, my main focus is on psychological experts on eyewitness identification, though I also discuss false-confession evidence as well, albeit to a lesser extent. However, the modular, repeat-play approach could plausibly be used in other settings as well. This approach could make sense in any area in which (1) the same social-science or empirical issues arise in largely the same form over a broad array of cases, or (2) the core contributions of the expert to the trial are at the “meta” or “framework” level rather than in assessing particularized dimensions of the specific facts and their implications. For example, another fruitful area for modular testimony might be the scientific reliability of certain forms of forensic science. Currently, experts do occasionally testify on the extent of scientific research in fingerprint, firearms, bite mark, or handwriting identification.²² These testifying experts are often not themselves forensic

17. See generally Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987) (describing the rise of social frameworks as an alternative to the rigid distinction between social science being used to prove legislative or adjudicative facts and proposing ways to incorporate the general findings of such research into the adjudicative process).

18. *Id.* at 568, 598.

19. See Simon A. Cole, *Out of the Daubert Fire and into the Fryeing Pan? Self-Validation, Meta-Expertise and the Admissibility of Latent Print Evidence in Frye Jurisdictions*, 9 MINN. J.L. SCI. & TECH. 453, 456–57 (highlighting that, when courts must evaluate the validity of claims where the appropriate reference community is not obvious, courts must turn to “meta-experts” who have evaluated the empirical and rational validity of those claims); Jennifer L. Mnookin, *Atomism, Holism, and the Judicial Assessment of Evidence*, 60 UCLA L. REV. 1524, 1577–78 (2013) (discussing the widespread practice of scientific experts using meta-analytic techniques to aggregate evidence and data in their own domain).

20. See Samuel R. Gross & Jennifer L. Mnookin, *Expert Information and Expert Evidence: A Preliminary Taxonomy*, 34 SETON HALL L. REV. 141, 163 (2003) (defining “instruction” as “general information about some common issue or phenomenon . . . rather than specific information about a particular problem or case”).

21. See Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955) (explaining the general nature of legislative facts).

22. See, e.g., *United States v. Saelee*, 162 F. Supp. 2d 1097, 1101–03 (D. Alaska 2001) (describing a nonforensic practitioner’s testimony regarding the lack of scientific research for handwriting identification); Michael J. Saks, *Banishing Ipse Dixit: The Impact of Kumho Tire on Forensic Identification Science*, 57 WASH. & LEE L. REV. 879, 897–99 (2000) (describing cases

practitioners of the discipline upon which they are commenting, and they typically do not offer any specific conclusion about whether the fingerprints, bullets, bite marks, or handwriting specimens actually match.²³ As with testimony by research psychologists, in many cases in which such forensic science meta-expertise would be helpful no one is called to testify, sometimes for lack of funds, often for lack of know-how (and sometimes because some courts have resisted permitting it).²⁴

Although my focus is criminal trials, where resource differentials are most acute and our methods for managing them less developed, there are many uses of framework testimony in civil cases as well, and it might be possible for modular, made-in-advance testimony to be used on the civil side as well.²⁵

This Article proceeds as follows. The next Part describes this idea of modular testimony in slightly more detail. The following Part then turns to issues relating to judicial evaluation of the reliability of eyewitness identification evidence and confessions, beginning with a brief historical overview that shows the lack of judicial focus on the substantive reliability of these kinds of proof. I suggest that this lack of direct focus on reliability may be one factor contributing to the rise of expert evidence in these areas; if concerns about the design of a lineup or flaws in an identification procedure or interrogation rarely lead to its outright exclusion, these same

where expert testimony was offered regarding the extent of scientific research for identification evidence).

23. See, e.g., *Saelee*, 162 F. Supp. 2d at 1101–03 (experts testified before the court as to the reliability of handwriting analysis generally, rather than in reference to the specific facts of the case).

24. See, e.g., *In re Castro*, Nos. H036045, H034813, 2012 WL 271339, at *3 (Cal. Ct. App. 2012) (discussing defense counsel’s failure to hire a handwriting expert); *Howard v. State*, 945 So. 2d 326, 334 (Miss. 2006) (describing defense counsel’s failure to obtain funds for a bite mark expert); *State v. Clopten*, 223 P.3d 1103, 1106 (Utah 2009) (noting the trial court’s refusal to allow an eyewitness expert’s testimony). Note that I have on rare occasions testified about the scientific foundation (and limits to that foundation) for fingerprint evidence and in one case was excluded from court because I was not myself a fingerprint expert.

25. See U.S. Courts, *The Patent Process: An Overview for Jurors*, YOUTUBE (Nov. 22, 2013), <https://www.youtube.com/watch?v=ax7QHQTbKQE&list=PL4bcxoLSIaXeVdyUI1500VSrfuKyIXLlJ&index=2>, archived at <https://perma.cc/HL3Q-T357> (an effort by the Federal Judicial Center to produce a video explaining the patent process to jurors in a nonpartisan, balanced manner, for Federal District Courts to use to educate jurors during patent trials). Although this made-in-advance video presentation is not precisely an example of the kind of modular testimony that I am suggesting in this Article, it nonetheless deserves our notice, particularly because it represents an effort by a nonpartisan organization to create a fair depiction of a set of issues that are “repeat play,” in the sense that they frequently arise in nearly identical form in different cases. However this patent video is, in important ways, quite different from what I am proposing because the patent video is an introductory lecture, not testimony—there is no direct or cross-examination by lawyers, nor are the topics discussed based on social science research. Notwithstanding these important differences, this patent video is an interesting example of an effort to gain efficiencies—and increased fairness—via technology. Many thanks to Joe Cecil for drawing my attention to this video.

concerns provide part of the justification for permitting expert testimony—but expert testimony, I suggest, cannot possibly be used as a practical matter in all of the cases in which it might be helpful. In the following Part, I therefore look at two already-established alternatives to expert evidence: judicial gatekeeping, in the form of a more serious examination of reliability, and jury instructions designed to teach jurors about the social science in this area. I suggest that a more robust reliability screen for these kinds of evidence, while superficially appealing, is unlikely to be highly accurate in evaluating correct and incorrect identifications or in distinguishing true from false confessions, and therefore raises significant institutional concerns about the boundary between the role of the judge and that of the fact finder. As for jury instructions in this area, I argue that this approach conflates instruction with evidence in troubling ways and inevitably fail to provide nuanced information about relevant social science (or its limits). Then, in the final Part, I return to modular testimony and address briefly how it compares to traditional expert evidence. I suggest that modular testimony invites us to ask directly whether we think experts in these areas ought ever to be able to testify in a case-specific, particularized way, or should be limited to a description of the general research. If the latter, modular testimony’s made-in-advance, non-case-specific format becomes a feature rather than a bug, because it structurally prevents experts from commenting on how the social science bears on the particular case—after all, the testifying experts aren’t even in the courtroom. If, however, it is sometimes appropriate for an expert to engage more particularistically, then it is a downside of modular testimony that such particularistic engagement is not available. Nonetheless, given the high cost of live experts, on the one hand, and the limited effectiveness of both reliability assessments and jury instructions, on the other hand, I argue that modular testimony is, at a minimum, a second-best solution worth a try.

I. Modular, Repeat-Play Testimony: An Introduction

My core idea is quite simple: courts should permit defendants to make use of made-in-advance “modules” in which psychological experts provide testimony about key aspects of eyewitness identification and false-confession evidence. These modules would be structured like regular testimony in that they would include both direct examination and cross-examination and, like regular testimony, they would proceed in the question and answer format to which we are accustomed.

When I describe the testimony as modular, I mean to suggest it should consist of a variety of distinct subparts in both the direct and cross-examination portions, each of which corresponds to a particular topic that frequently arises within trials in which expert testimony of these sorts is used (e.g., a discussion of the research on cross-racial identification could be one module, while discussion of the research on weapons focus, or the

relationship between confidence and accuracy of an identification, or the relationship between observation time and accuracy could be others). Each module should to the greatest possible degree be substantively self-contained so that a defendant could separate them and make use of only the ones that bore on the issues in the specific case.

For this idea to be effective and successful, the experts who participate in this project would need to be some of the best regarded leading experts in the field. The lawyers who participate—on both the “defense” side and for the “prosecution,” though I use those terms in scare quotes because the lawyers would not in fact be representing a specific client as they questioned the expert—should also be of the highest caliber with extensive experience in precisely these areas and themselves extremely knowledgeable about the social science. All the participants should be compensated appropriately for their time and energy in producing the modules. Nor should the use of these modules—which would, as I already indicated, include cross-examination—subject the experts to being subpoenaed by the prosecution in any case in which the module was used, though if the prosecutor wished to call a live rebuttal witness, nothing about the existence of modules ought to prevent her from doing so.

For this idea to be workable, the modules would need to be produced by a well-regarded, structurally neutral organization, not affiliated with either the defense bar or the prosecutors. It might also be possible for the content of the modules to be vetted or assessed by experts to provide a form of peer review to assess its fundamental fairness and legitimacy.

My basic claim is that this form of modular evidence deserves to be a tool in our trial toolbox. Many, indeed most, courts are willing to permit experts to testify on eyewitness identification issues, and a growing number are permitting false-confession experts as well. Given the framework nature of this evidence and the basic reality that most of what an expert testifies to will not be—and quite likely should not be—case specific, why do we continue to hew to the idea that the evidence must be produced in an individualized, case-specific manner?

Permitting modular expert evidence will require some creativity on the part of judges and an openness to innovation, and it is quite possible that it will be loudly opposed by both prosecutors and defense counsel alike. But given the simple reality that expert witnesses are unlikely to be available in the vast majority of cases in which they would be useful, it seems worthwhile to be open to efforts to create wholesale rather than retail methods of engagement about these social science findings. Indeed, the turn in some states to increasingly detailed and science-based jury instructions represents precisely such an effort—but I contend that modular testimony in fact is more institutionally appropriate than science-based instructions. Similarly, modular testimony may also be more respectful of the appropriate roles for judge and jury than a direct judicial effort to assess

the reliability of confessions or eyewitness identifications. We turn now to look briefly at how the courts currently think about reliability, with respect to eyewitness identification and confessions in turn.

II. Judicial Assessments of Reliability

A. *The Brathwaite Test for Assessing the Reliability of an Eyewitness Identification*

It is perhaps stating the obvious to say that we would like to make use of eyewitness identifications and confessions in court whenever they are likely to be adequately reliable. While not technically a corollary, it seems equally reasonable to say that when confessions or eyewitness identifications are very likely to be unreliable, we ought *not* to permit them as evidence (unless we have confidence that the fact finder can do its own reasonably accurate assessment of the evidence's reliability).

However, for both eyewitness identifications and confessions, it is far from clear that our current doctrinal tests for admissibility map onto reliability and validity in any meaningful way. In 1977, the Supreme Court in *Manson v. Brathwaite*²⁶ laid out the test that is largely still used today in federal courts and in most states for determining when, if ever, due process mandates exclusion of eyewitness identification.²⁷ An undercover policeman made a narcotics purchase and shortly afterwards described the seller to two fellow officers.²⁸ The undercover agent was shown a single photograph of a possible suspect, a method of identification known as a "showup," and identified him as the seller.²⁹ Based on this identification, the suspect was charged with possession and sale of heroin.³⁰ Subsequently at trial, this photograph from the showup was introduced into evidence, and the narcotics agent on the stand made a positive, in-court identification of the defendant (who claimed to have been ill at home, elsewhere, all day on the date in question).³¹ Almost entirely on the basis of these identifications, the defendant was convicted of both counts.³² The defendant appealed, arguing that the identification procedure—a single photograph, rather than a

26. 432 U.S. 98 (1977).

27. This case built on earlier jurisprudence about eyewitness evidence, police conduct, and suggestibility. See, e.g., *Neil v. Biggers*, 409 U.S. 188, 195–96 (1972) (raising the issue of whether the victim's identification of the respondent in a lineup violated due process); *Stovall v. Denno*, 388 U.S. 293, 302 (1967) (acknowledging that while "[t]he practice of showing suspects singly to persons for the purpose of identification . . . has been widely condemned[.]" the totality of the circumstances in the record did not suggest due process had been violated).

28. *Brathwaite*, 432 U.S. at 99–101.

29. *Id.* at 101.

30. *Id.*

31. *Id.* at 102.

32. *Id.*

lineup or any kind of comparison to others—was unnecessarily suggestive and violated his due process rights.³³ Although the court of appeals agreed with the defendant,³⁴ the Supreme Court did not.³⁵ While asserting that “reliability is the linchpin in determining the admissibility of identification testimony[,]” the Court also found that due process required protecting this “evidentiary interest” only to a “limited extent.”³⁶ Identifications ought to be excluded, the Court said, only when there is “a very substantial likelihood of irreparable misidentification”³⁷—note, particularly, the double modifier, not merely a *substantial* likelihood, but a *very* substantial likelihood—and “[s]hort of that point, such evidence is for the jury to weigh.”³⁸ The Court continued: “We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.”³⁹

The Court asserted, in essence, that eyewitness identifications should be admissible unless they are *extremely* likely to be wrong, largely because of its faith in the jury’s good sense as a mechanism for separating the valid from the mistaken.⁴⁰ *Brathwaite* laid out factors courts should examine when considering the “totality of the circumstances”⁴¹ to determine the procedural adequacy of an identification:

These include the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.⁴²

Finally, the Court found that defects—like the fact that the officer made the identification based on a single photo—most often go to weight rather than admissibility.⁴³ Thus, under *Brathwaite*, even identifications that are the result of highly suggestive identification procedures may be

33. *Id.* at 103.

34. *Brathwaite v. Manson*, 527 F.2d 363, 372 (2d Cir. 1975).

35. *Brathwaite*, 432 U.S. at 117.

36. *Id.* at 113–14 (emphasis omitted).

37. *Id.* at 116 (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)) (internal quotation marks omitted).

38. *Id.*

39. *Id.*

40. *See id.*

41. *Id.* at 113 (quoting *Stovall v. Denno*, 388 U.S. 293, 302 (1967)) (internal quotation marks omitted).

42. *Id.* at 114.

43. *Id.* at 117.

introduced in court, so long as the court's estimation of the totality of the circumstances does not suggest a very substantial likelihood that the identification is wrong.

There are two points worth emphasizing. First, by the Court's own acknowledgement, and indeed by design, it takes a lax and limited approach to the scrutiny of eyewitness identifications.⁴⁴ A court's purpose is not to assure that they are valid, nor even strongly to incentivize lineup procedures designed to maximize reliability. Rather, a court's inquiry is meant to offer a limited last-ditch check on egregiously unreliable identifications—and, even then, only if the unreliability is produced by some improper action of the state vis-à-vis the identification process.⁴⁵ In recent years, the Court has continued to embrace this approach, explaining in *Perry v. New Hampshire*⁴⁶ in 2012 that “[t]he fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.”⁴⁷

Second, the characteristics suggested by the Court as deserving analysis may indeed be common sense, but that does not make them especially useful at reliably distinguishing valid from invalid identifications. It turns out that several of them—perhaps most notably the level of certainty expressed in court at the time of confrontation—do not, according to social science research, bear significantly on accuracy in most circumstances and may themselves be matters about which witnesses can be highly suggestible.⁴⁸ More pointedly: a little police nudging can go a long way toward increasing witness confidence, and according to the research, the relationship between well-after-the-fact confidence level and accuracy is basically nonexistent.⁴⁹ Moreover, like any qualitative, multifactor

44. *Id.* at 110 (describing the totality of the circumstances approach employed by the court as the “more lenient[] approach”).

45. *See, e.g., Perry v. New Hampshire*, 132 S. Ct. 716, 726 (2012) (“The due process check for reliability, *Brathwaite* made plain, comes into play only after the defendant establishes improper police conduct. The very purpose of the check, the Court noted, was to avoid depriving the jury of identification evidence that is reliable, *notwithstanding* improper police conduct.”).

46. 132 S. Ct. 716 (2012).

47. *Id.* at 728.

48. Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 460 (2012).

49. *See* Kevin Krug, *The Relationship Between Confidence and Accuracy: Current Thoughts of the Literature and a New Era of Research*, 3 APPLIED PSYCHOL. CRIM. JUST. 7, 9 (2007) (concluding that the bulk of social-science research suggests “that confidence is a poor indicator of memory accuracy”); Gary L. Wells & R. C. L. Lindsay, *Methodological Notes on the Accuracy–Confidence Relation in Eyewitness Identifications*, 70 J. APPLIED PSYCHOL. 413, 418 (1985) (same). For a meta-analysis finding a limited but nonzero relationship between confidence and accuracy at the time of selection, see Siegfried Ludwig Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence–Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULL. 315, 315–17 (1995). For an example of the particular issues relating to retrospective certainty, see Amy L. Bradfield et al., *The Damaging Effect of*

balancing test—especially one tilted so explicitly in favor of admissibility—few facts on the ground will actually mandate exclusion of an identification. How much delay between crime and identification is too much? What would make a viewing opportunity so limited as to justify exclusion? Given the vagueness of the factors, any court that cares to admit a particular identification can likely tell an adequate story to justify its decision, even for quite dubious identification evidence produced through suggestive methods.⁵⁰

This deferential approach to admitting eyewitness identifications, coupled with substantial, emerging social-science research conducted by psychologists, created a substantial opening (and need) for expert testimony in this area. To put it differently, if nearly all identifications are admissible, and if defects typically are understood to go to weight rather than admissibility, then clearly the defendant should have the opportunity to argue that a particular identification does not actually deserve much—or any—weight. Simultaneously, social-science research began to provide some powerful fodder for challenges to weight by identifying and studying a range of “estimator factors” that appear to effect the accuracy of identification—factors like whether a gun or other weapon was involved, whether the identification was of someone of a different race from the observer, or whether the observer was under substantial stress at the time of making the observation.

*B. The Judicial Assessment of Confessions:
The Emphasis on Voluntariness, Not Reliability*

With respect to confession evidence, substantive reliability is—if it is possible—even less regulated by courts than it is with eyewitness identification. Although reliability was deemed an important concern in assessing confessions in the nineteenth and early twentieth centuries, beginning in the middle of the twentieth century the courts took a jurisprudential turn away from reliability and toward inquiries focused on

Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy, 87 J. APPLIED PSYCHOL. 112, 112–14 (2002).

50. In fact, for example, in Garrett’s examination of DNA exonerations, none of the nearly forty defendants who alleged some form of police impropriety in the identification procedure which led to their (erroneous) identification were granted relief. GARRETT, *supra* note 5, at 187. In addition, many courts will permit an in-court identification by the witness even if they have excluded the earlier identification on the dubious theory that the witness’s in-court identification has an “independent origin” of the events (and is therefore directly mentally matching the in-court identification to the actual event, unmediated by the problematic intermediate identification process). Garrett, *supra* note 48, at 465–66. For a description of the operation of this approach and a strong critique of it, see generally *id.* However, some states have begun to take more aggressive approaches than the federal courts to the judicial assessment of the reliability of eyewitness identification. For a discussion of some recent state developments, see Jules Epstein, *Irreparable Misidentifications and Reliability: Reassessing the Threshold for Admissibility of Eyewitness Identification*, 58 VILL. L. REV. 69, 79–81 (2013).

voluntariness and coercion.⁵¹ While initially the language of voluntariness was deployed in the service of concerns about trustworthiness and reliability, “voluntariness” gradually became instead a purely procedural concern grounded in the Due Process Clause of the Fourteenth Amendment and focused not on accuracy per se but on the confessor’s self-determination and the freedom to speak or choose silence in the face of police methods.⁵² Consider, for example, this language from the 1961 Supreme Court case *Culombe v. Connecticut*.⁵³

The ultimate test remains that . . . of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confessions offends due process.⁵⁴

The key question is not reliability, but whether the speaker’s will is “overborne” or remains free. The real issue at the heart of the voluntariness inquiry, as the Court made absolutely explicit in a later case, was not accuracy as an independent value, but rather the presence of illegitimate police coercion.⁵⁵

But even if reliability is not central to admissibility, that obviously does not make it irrelevant to the evaluation of an admissible confession’s probative value. Though the area is not as substantially researched as eyewitness identifications (and is also by its nature harder to study

51. For an account of this transition and an argument to revive a focus on reliability, see Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 779–80 (2013) (detailing the shift in the Court’s jurisprudence). See also Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 310 (1998) (providing a historical account of the shift in standard).

52. Leo et al., *supra* note 51, at 780–81. See also YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 10–11 (1980) (contending that the term “voluntariness” was originally a “synonym for the ‘trustworthiness’ or ‘reliability’ test”).

53. 367 U.S. 568 (1961).

54. *Id.* at 602.

55. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (holding that “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth Amendment”). To be sure, coercion and accuracy may well be related—coercive processes may significantly increase the chance of inaccurate confessions. But sometimes coercive methods may in fact produce accurate confessions—for reasons independent of accuracy we may well deem their use unacceptable, but the reason for that is not accuracy itself. Similarly, strong evidence exists to show that even when confessions are voluntary and no illegal coercion has been applied, they are not therefore necessarily accurate. Leo et al., *supra* note 51, at 765–67 (describing how even seemingly innocuous police activity, like disclosure of nonpublic crime details, can lead to inaccurate confessions). See generally Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 17 CURRENT DIRECTIONS PSYCHOL. SCI. 249, 251 (2008) (describing various characteristics and interrogation techniques that increase the likelihood of false confessions).

effectively through experiments),⁵⁶ a growing body of research contributes to our understanding of the causes and circumstances that increase the risks of false confessions, including both characteristics of the suspect (e.g., juveniles and those with mental disabilities may be at increased risk to confess falsely), as well as characteristics of the interrogation process (including the length of the interrogation or the police falsely claiming to have strong evidence pointing to the suspect).⁵⁷ This research also reveals some of the characteristics often present within confessions subsequently found to be false—like the police frequently “feeding” the correct information to the suspect rather than eliciting through questioning (accurate) information about the crime previously unknown to them or “contaminating” the interrogation by providing information not publicly known about the crime and then treating it as evidence of guilt when the defendant repeats back this information.⁵⁸

In some ways, to be sure, the lack of doctrinal focus on reliability is conceptually separate from the question of the use of expert evidence in these areas. Even if courts engaged in robust reliability assessments as a prerequisite to admissibility of confessions and eyewitness identification testimony, presumably the admissibility decision by a judge would not remove from the fact finder the responsibility to assess the appropriate probative value of the eyewitness identification or the confession—and assessing reliability is (or at a minimum should be) a central part of determining that probative value.⁵⁹ Therefore, expert testimony could well still be of assistance to the fact finder even if the court had a more robust reliability requirement underlying admissibility. Alternatively, if social-science research had few significant findings relating to these areas, expert

56. For both areas, archival or field studies raise complicated issues about knowing “ground truth.” But eyewitness identification is much more easily studied in an experimental setting than false confession—it is not difficult to design an experiment to test people’s ability to make a correct identification (though, to be sure, it is difficult to create experimental conditions that are as stressful and potentially traumatic as a real crime). It is more difficult to create experimental conditions that could induce false confessions in circumstances with serious consequences akin to a police interrogation.

57. Kassin, *supra* note 55, at 250–52.

58. Brandon Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 408–15 (2015); Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. AM. ACAD. PSYCHIATRY & L., 332, 337 (2009).

59. We see precisely this situation with *Daubert*—that is to say the judge’s gatekeeping responsibility vis-à-vis expert evidence requires a direct focus on validity and reliability—but clearly, parties ought nonetheless to be able to challenge the reliability of any given item of expert evidence, notwithstanding that the judge has already made her own assessment of reliability prior to permitting the evidence. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 594–95 (1993) (holding that the inquiry into expert evidence is concentrated on scientific validity, evidentiary relevance, and reliability).

testimony might not be of assistance to a jury, regardless of whether or not the court meaningfully evaluated reliability.⁶⁰

C. *The (Limited) Rise of Expert Identification and False Confession Evidence*

It is speculative, to be sure, but there may well be some degree of connection between the lack of any serious reliability inquiry by the court and the rise of expert-witness evidence in these areas. This combination—a well-developed social-science literature examining factors relating to reliability and a lack of judicial assessment—creates a particularly ample conceptual space for expert testimony at trial. An emerging body of research bears directly on the validity of key forms of evidence, but courts have decided, structurally, not to engage with this literature when assessing admissibility.

This lack of consideration of reliability in admissibility decisions may, therefore, over time have created hydraulic pressure to consider it elsewhere in the trial process, and this may in part explain the increasing willingness on the part of courts to admit expert testimony, particularly vis-à-vis the limits of eyewitness identification. The rise of knowledge about wrongful convictions and the important role that erroneous identifications (and false confessions) have played in many of the known wrongful convictions no doubt further contribute to the increased willingness, in recent years, to admit these forms of testimony to assist the jury in its evaluation of the evidence.⁶¹

Indeed, in its recent report on eyewitness identification, the National Academy of Sciences urges courts to take very seriously the use of expert evidence in this area to assist the fact finder.⁶² As the report states:

Contrary to the suggestion of some courts, the committee recommends that judges have the discretion to allow expert testimony on relevant precepts of eyewitness memory and identifications. Expert witnesses can explain scientific research in detail, capture the nuances of the research, and focus their testimony

60. Rule 702 of the Federal Rules of Evidence allows expert evidence only when “the expert’s scientific, technical, or other specialized knowledge will *help* the trier of fact to understand the evidence or to determine a fact in issue.” FED. R. EVID. 702(a) (emphasis added). Therefore, courts regularly exclude expert evidence if they do not believe it will assist the trier of fact. *See, e.g.,* *Boyd v. State Farm Ins. Cos.*, 158 F.3d 326, 331 (5th Cir. 1998) (commenting on the trial court’s “broad discretion to rule on the admissibility of the expert’s evidence”).

61. On wrongful convictions see, for example, GARRETT, *supra* note 5, at 251. In the 250 exonerees Garrett studied in his book, he found that misidentification by an eyewitness was present in 76% of the cases. *Id.* at 8–9. He also found that 16% of the exonerees in his sample confessed to crimes they did not commit. *Id.* at 18. For similar findings from a broader examination of exonerations, see generally SAMUEL R. GROSS & MICHAEL SHAFFER, NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989–2012 (2012).

62. IDENTIFYING THE CULPRIT, *supra* note at 2, at 111.

on the most relevant research. Expert witnesses can convey current information based on the state of the research at the time of a trial. Expert witnesses can also be cross-examined, and limitations of the research can be expressed to the jury.⁶³

In urging greater use and acceptance of expert witnesses in this area, the committee is both reflecting a sea change well underway and, likely, encouraging its further development.

But that said, there is little doubt that expert testimony is still only used in a small fraction of those cases in which it might be relevant.⁶⁴ This state of affairs results sometimes because it is still excluded—but far more often there is simply no serious attempt to introduce it in the first place.⁶⁵ In many cases, defense attorneys may not be able to get funding for an expert or—and in practice it leads to the same result—may not believe they can get funding and hence may not even try.⁶⁶ Though numbers are scarce, a set of authors, including leading eyewitness-identification experts, estimated (albeit, back in 1998) that the total number of American cases in which experts provided testimony in the area could not possibly much exceed five hundred.⁶⁷ By contrast, an equally dated figure based on a survey of practices suggests that eyewitness identification is the most critical evidence in just under 80,000 criminal arrests a year.⁶⁸ Even if, given the prevalence of plea bargaining,⁶⁹ we assume that only 5% of those arrests actually go to trial, this would suggest that experts are testifying in only roughly 8% of those cases involving eyewitness identification as a *crucial* form of evidence. To be sure, both of these numbers should be taken with a large grain of salt, and they are also dated by more than fifteen years. But the fundamental reality is, without a doubt, that expert

63. *Id.*

64. See George Vallas, *A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses*, 39 AM. J. CRIM. L. 97, 114–16 (2011) (noting that while there has been a recent trend in both federal and state courts toward the acceptance of expert eyewitness testimony, judicial approaches still vary across jurisdictions); *infra* notes 67–70 and accompanying text.

65. See IDENTIFYING THE CULPRIT, *supra* note 2, at 40 (explaining that the expense of eyewitness-identification experts can be a deterrent to their use).

66. As *Identifying the Culprit* recognizes, this problem is likely more acute in state courts than in federal courts. *Id.*

67. Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 609 (1998).

68. Alvin G. Goldstein et al., *Frequency of Eyewitness Identification in Criminal Cases: A Survey of Prosecutors*, 27 BULL. PSYCHONOMIC SOC'Y 71, 73 (1989). Specifically, they estimated about 77,313 people were arrested in cases in which the eyewitness identification was “crucial,” extrapolating this figure from a survey of district attorneys. *Id.*

69. Erica Goode, *Stronger Hand for Judges in the ‘Bazaar’ of Plea Deals*, N.Y. TIMES, Mar. 22, 2012, <http://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html>, archived at <http://perma.cc/BH3U-8KJ6> (stating that plea bargains end 97% of federal cases and 94% of state cases); Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1722 (2005).

eyewitness (and false confession) testimony is only used in a small percentage of the cases in which it might be both appropriate and helpful.⁷⁰

This means, in essence, that some defendants win the expert-access lottery and others—not a few, but most—don’t even get a lottery ticket, much less any winnings. Some get to sport couture attire, while others are (metaphorically) naked.

III. Alternatives to Expert Witnesses

Live testimony by expert witnesses is used in only a small fraction of cases in which their testimony might assist the jury. There is absolutely no reason to believe that this situation can or will change dramatically. The costs of experts, their scarcity, and the number of cases in which they might be advisable make it impossible to imagine that we could use expert psychological witnesses in all the cases in which they might have relevant, helpful information.⁷¹

That reality invites a search for alternative methods for either preventing unreliable testimony from reaching the jury in the first place or for educating it about its possible limitations. In what follows, I will explore two possible alternatives, showing in each case why they are ultimately quite unsatisfactory even though they are superficially appealing. Furthermore, the inadequacy of these alternatives strengthens the case for taking more radical steps toward new methods of jury education, such as modular testimony.

A. *Judicial Gatekeeping*

I turn first to the possibility of judicial gatekeeping for reliability. As I suggested earlier, it is plausible to think that the lack of a direct judicial focus on reliability contributed, over time, to a greater openness to (and need for) psychological experts in these areas.⁷² But perhaps a more intensive judicial inquiry into reliability could itself serve as an alternative to the use of expert psychological evidence. As I stated above, the two are not direct substitutes for each other—even if judges were stronger gatekeepers with regard to the reliability of confession and eyewitness testimony, defendants might well wish to use expert social scientists to inform the jury about what is known about circumstances and factors that

70. See, e.g., CRIM. JUSTICE SECTION, AM. BAR ASS’N, REPORT TO HOUSE OF DELEGATES 104D, at 2–3 (2008) (finding the problem of “mistaken eyewitness identification . . . a serious problem in the United States” and recommending increased use of expert testimony on “cross-racial identification” to combat the issue).

71. The American Bar Association recognizes this and explicitly “opposes exclusive reliance on expert witnesses” due to their cost and the fact that only a “small number of persons [are] qualified to testify as expert witnesses on cross-racial identification”). *Id.* at 3–4.

72. See *supra* subpart II(C).

increase the risk of inaccuracy.⁷³ A stricter admissibility standard would not obviate the need for experts to help the jury assess the appropriate weight of the admitted testimony. But the question is how we might decrease the chances that mistaken eyewitness evidence or false confessions lead fact finders to the use of expert evidence from psychologists. Put bluntly, if fewer false confessions or mistaken eyewitness identifications were admitted in the first place, there would be less need of expert testimony designed to educate juries about the limits to these forms of evidence and the possibilities for error.

Indeed, the recent National Academy of Science report on eyewitness identification makes an important recommendation connected directly to these issues of judicial assessment of reliability and the use of experts. First, the committee recommends that judges engage in more robust pretrial inquiry into reliability and that they should even do so independent of a party's request or objection to the evidence.⁷⁴ The committee suggested that judges should routinely examine key aspects of lineup design when assessing an eyewitness identification and also look at whether lineup procedures existed in documented form and, if so, whether they were in fact followed.⁷⁵ The committee recommendation continues: "If these initial inquiries raise issues with the identification process, a judge could conduct a pretrial hearing to review the reliability and admissibility of eyewitness identification evidence."⁷⁶ At this point, the committee report backs off slightly, suggesting that if indicia of unreliability are found, the judge "should apply applicable law"⁷⁷ in deciding whether to exclude or take any other action—but given the flaccid state of the applicable law on this score, this entreaty to apply it may, practically speaking, be asking for rather little. Nonetheless, the committee's recommendation certainly provides a meaningful nudge toward more substantial evaluations of reliability by judges.

A more robust assessment by judges of the reliability of eyewitness identifications and confessions as a precondition for admissibility would certainly be one possible method by which to reduce the number of false confessions and faulty or mistaken identifications used in court. Indeed, in addition to the gestures in that direction by the recent National Academy of Science report on eyewitness identification, several scholars have recently argued in favor of meaningful assessment of the reliability of any given

73. *Id.*

74. IDENTIFYING THE CULPRIT, *supra* note 2, at 109–10.

75. *Id.* at 110.

76. *Id.*

77. *Id.*

eyewitness identification or confession as a prerequisite to its admissibility.⁷⁸

On the face of it, direct judicial assessment of the reliability of these powerful yet problematic forms of evidence is indeed appealing. In the context of expert evidence, judges regularly assess reliability as a precondition for determining admissibility—why not apply a similar approach to these powerful forms of evidence as well? Presumably if judges managed to exclude confessions or eyewitness evidence likely to be unreliable, that would indeed be a valuable safeguard against the danger of erroneous convictions.

However nice such an approach sounds in theory, there is a significant problem in practice: we do not actually have validated methods by which to distinguish precisely, in a specific case, an accurate eyewitness identification from an inaccurate one or a true confession from a false one. Psychological research has shown us a good deal about tendencies in the aggregate and about, for example, estimator factors that appear to increase the risk of making an inaccurate identification.⁷⁹ But these are aggregate tendencies with varying (and sometimes quite limited) effect sizes. Going from knowledge about these aggregate tendencies to a diagnostic conclusion about reliability in a specific case usually goes well beyond our current state of scientific and psychological knowledge.

Let us briefly consider one example. The presence of a weapon during the event appears to decrease the accuracy of identifications made afterwards—but obviously, this does not mean that all, or even most, identifications made in relation to crimes involving weapons are therefore inaccurate. This “weapons focus” phenomenon has been found in most (though not all) laboratory studies that have examined it, but the effect sizes are often moderate and sometimes the presence of the weapon in an experiment seems to hurt the accuracy of feature recall but not necessarily

78. For arguments in favor of a reliability-based approach to the judicial assessment of eyewitness identification, see, for example, Epstein, *supra* note 50, at 96–100, arguing for an acknowledgedly amorphous sliding-scale approach to admissibility of eyewitness identification focused on reliability; Sandra Guerra Thompson, *Daubert Gatekeeping for Eyewitness Identifications*, 65 SMU L. REV. 593, 596 (2012), arguing that *Daubert*’s reliability focus should apply more stringently to eyewitness identifications; and Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1495 (2008), advocating for a corroboration requirement when the state presents eye witness testimony. For arguments in favor of reliability-focused reforms for confession evidence, see, for example, Richard A. Leo et al., *supra* note 51, at 764, proposing a framework for analyzing reliability of confession evidence, and Richard A. Leo et al., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 486–87, arguing that recording custodial interrogations should be a prerequisite of reliability.

79. See, e.g., Wells et al., *supra* note 67, at 603, 613–17 (describing factors that contribute to a false eyewitness identification). See generally sources cited *supra* note 2.

the ability to identify someone accurately.⁸⁰ Furthermore, how do these experimental findings translate into the real world? This is not altogether clear—indeed, some of the few studies focusing on real-world situations have not found a clear weapons focus effect at all, though there are also plausible reasons to discount these findings (both because of difficulties in making reliable inferences when we don’t actually know ground truth and also because in field studies, as opposed to experiments, the underlying scenarios, because they are real, are inevitably so much more complex that any specific issue, like weapons focus, may be swamped by other characteristics of the identification circumstances).⁸¹

My point is not the details of the weapons focus effect—a topic on which many dozens of papers have been written. The point is more general. There are numerous estimator variables that have been shown across a number of studies to have some statistically significant effect on memory, recall, and identification. But this effect does not necessarily mean that the presence of a given variable—or even several—signals an inaccurate identification. It means, at most, that if all other aspects are equal, an identification with this concerning estimator variable may be more likely to be erroneous than an identification without it. But the effect size of any given variable may be quite modest. Moreover, in the real world, to say that “all other aspects are equal” is more or less meaningless. Individuals vary in their attention to detail or their general observational accuracy. Moreover, any given estimator variable needs to be understood alongside the other dimensions of the particular identification circumstances. A witness who has a longer time to observe the perpetrator may be more accurate, even when a weapon is involved, than one who has only a short opportunity for observation. But how the different aspects of an identification interrelate has received far less careful experimental study to date than individual estimator (or system) variables.⁸²

Given this state of affairs, ought we to really wish for judges to make reliability determinations about an identification based on their evaluations of the estimator variables? These variables can, to be sure, legitimately

80. See, e.g., Jonathan M. Fawcett et al., *Of Guns and Geese: A Meta-Analytic Review of the ‘Weapon Focus’ Literature*, 19 PSYCHOL. CRIME & L. 35, 44 (2013) (“[W]eapon presence appears to be clearly detrimental to feature accuracy (e.g., recall), but only sporadically affects identification accuracy.”); Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW & HUM. BEHAV. 413, 420–21 (1992) (concluding as a result of meta-analysis of several previous experiments that the weapon-focus effect is statistically significant, but the magnitude of the effect is not great).

81. Steblay, *supra* note 80, at 422.

82. See IDENTIFYING THE CULPRIT, *supra* note 2, at xiii–xiv (noting the lack of certainty surrounding the interplay of reliability factors in eyewitness identifications).

raise red flags—but if they cannot be truly diagnostic, is it appropriate for the judge to determine reliability, and in turn admissibility, on their basis?⁸³

To make the point in a slightly different fashion, consider that we do not let experts opine in court on whether a specific eyewitness identification is or is not reliable. When experts testify, they are generally permitted to describe the factors relevant to the specific case that have been studied and what research has shown about them, but they are not permitted to tell the jury that it therefore should or should not believe any given witness. As one psychological expert put it on direct examination vis-à-vis his role in the case:

Q ARE YOU HERE TO GIVE AN OPINION AS TO THE ACCURACY OF THE WITNESSES IN THIS CASE IN THEIR IDENTIFICATIONS?

A OH, NO, NO. AS I UNDERSTAND IT, AGAIN, MY ROLE IS QUITE NARROW. IT'S TO AVOID GIVING ANY OPINIONS THAT MIGHT EXPRESS TO YOU ALL, THE TRIERS OF FACT, THAT I HAVE SOME SORT OF TAKE ON WHETHER THE WITNESSES ARE RIGHT OR WRONG OR CORRECT OR INCORRECT, AND TO JUST EXPLAIN THE CURRENT STATE OF THE SCIENCE. IN MY VERY NARROW AREA OF EXPERTISE OF MEMORY AND SUGGESTIBILITY TO THE TRIERS OF FACT.⁸⁴

Later in the direct examination, the expert reiterated the point:

THERE'S CERTAINLY NOTHING I COULD GIVE YOU ALL THAT CAN BE QUANTIFIED AS, "THIS IS IT." THESE ARE JUST FACTORS THAT HAVE BEEN FOUND TO AFFECT WITNESSES BOTH IN THE FIELD AND THEN AS DEMONSTRATED IN THE LABORATORY.⁸⁵

On cross, the point was made even more strongly that the expert could testify to the relevant phenomenon, but not apply it to the specific case:

83. The same difficulty applies to false-confession evidence. Consider contamination. There is substantial evidence that many false confessions contain examples of interrogators providing information about the crime during the course of the interrogation. When that information appears in the confession, it enhances the apparent validity. Leo et al., *supra* note 51, at 765–66. But it may also be that true confessions frequently reveal examples of contamination by interrogators as well. Until we know substantially more about the base-rate frequency of contamination in true and false confessions—along with the base rates for true and false confessions themselves—we cannot possibly know that a confession is unreliable simply because some degree of contamination can be pointed to. This inability to diagnose falseness from characteristics like contamination means that reliability hearings for false-confession evidence, while superficially appealing, are in fact unlikely to be effective. *See id.* at 779.

84. Transcript of Record at 2434, *State v. White*, 2007 WL 5248507 (Cal. Super. Ct. L.A. Cnty. Sept. 20, 2007) (No. B204494).

85. *Id.* at 2454.

Q NONE OF THE STUDIES THAT YOU'VE SHARED WITH US TALK ABOUT UNIVERSAL TRUTHS, CORRECT?

A NO, I WOULDN'T TAKE IT TO THAT LEVEL.

Q YOU BASICALLY SHARE WITH US SOME STUDIES WHICH FOUND CERTAIN THINGS? . . .

. . . .

Q YOU'RE ESSENTIALLY SAYING, DOCTOR, ISN'T IT, THAT YOU CANNOT PREDICT WHETHER OR NOT STRESS AFFECTED AN EYEWITNESS, AN EYEWITNESS'S MEMORY?

A IN ANY GIVEN CASE?

Q YES.

A NO. THAT IS CLEARLY UP TO THE TRIERS OF FACT AND ALL MY JOB IS, AS I UNDERSTAND IT, IS TO EXPLAIN GENERALLY-ACCEPTED FINDINGS IN THE RESEARCH THAT MIGHT BE BEYOND THE COMMON KNOWLEDGE OF FOLKS WHO DON'T DO RESEARCH IN THIS AREA AS THEY EVALUATE AND WEIGH THE EVIDENCE ON THEIR OWN.⁸⁶

And with respect to the weapons focus issue in particular:

Q WEAPON FOCUS. THE STUDIES THAT YOU'VE DESCRIBED FOR US BASICALLY INDICATE THAT IN SOME SITUATIONS SOME WITNESSES FOCUS ON WEAPONS, ON THE WEAPON INVOLVED?

A YES.

Q IT DOESN'T MEAN THAT IT HAPPENS ALL THE TIME, CORRECT?

A OH, NO. EVERYONE RESPONDS DIFFERENTLY TO A WEAPON BEING PRESENT, I WOULD SAY.⁸⁷

I have used excerpts from this transcript as an example, but the expert's testimony is quite typical in this respect. Psychological experts in these areas do not tell the jury directly whether or not to believe the eyewitness identification.⁸⁸ The reasons for this limitation are twofold: first, and most important, that the science simply does not presently support this degree of specific, diagnostic conclusion about a particular witness;⁸⁹ and second, that especially given the lack of scientific basis for reaching a

86. *Id.* at 2459, 2472.

87. *Id.* at 2479.

88. Chelsea Moore, *Is Perception Reality?: An Argument Against the Use of Rule 403 for the Exclusion of Eyewitness Identification Expert Testimony*, 6 FIU L. REV. 163, 177 (2010).

89. See IDENTIFYING THE CULPRIT, *supra* note 2, at 112 (noting that "the committee has seen no evidence that the scientific research has reached the point that would properly permit an expert to opine . . . on the accuracy of an identification by an eyewitness in a specific case").

conclusion about a given witness, for the expert to opine in this way to the fact finder would invade the province of the jury, impermissibly entering into their legitimate sphere of judgment about credibility.⁹⁰

But if we do not permit the experts to opine about reliability, why should we allow judges to do so? If the experts themselves lack a legitimate scientific basis for reaching a conclusion about reliability in a given case, surely the (less expert) judges will also lack a legitimate scientific basis for theirs as well. Nor is it at all obvious that a judge's evaluation of the reliability of any given eyewitness identification would be more accurate than that of a jury, especially a jury who has had the opportunity to be educated about what the social-science evidence does and does not show about relevant factors in the case. If judges could in fact distinguish accurate from inaccurate identifications with a high degree of accuracy, or in any event a significantly higher degree of accuracy than a jury, having them evaluate reliability as a prerequisite for admissibility would be an attractive and perhaps justifiable policy. But if their error rate would be substantial or similar to that of the jury, this suggests we should avoid the policy and leave the assessment to the fact finder.

It is fair to ask the following question: if judges cannot assess accuracy reliably, why ought we believe that juries can plausibly handle the task? The honest answer is that juries will—and do, as we know from the many wrongful conviction cases that have come to light⁹¹—make errors as well. But there are nonetheless two reasons to prefer having juries—preferably educated in some way by experts—reach these judgments about reliability rather than judges doing it themselves.

First, as a matter of system design, credibility judgments under conditions of uncertainty are typically something we leave to the jury. The issue at stake is going from a set of general inferences—about factors influencing the accuracy of eyewitnesses or the validity of a confession—to a specific determination about the case at issue and the credibility of and weight to be given to a particular witness. Judging matters like credibility and the weight of a specific item of evidence are, within our system, core jury functions.⁹² So unless we have good grounds for believing that the judge will achieve a significantly higher degree of accuracy, from an institutional design perspective this task is better left with the jury.

90. Scott Woller, *Rethinking the Role of Expert Testimony Regarding the Reliability of Eyewitness Identifications in New York*, 48 N.Y.L. SCH. L. REV. 323, 325 n.15 (2003).

91. See GARRETT, *supra* note 5, at 213–22 (documenting various cases of wrongful convictions); GROSS & SHAFFER, *supra* note 61, at 43–50 (documenting exonerations following erroneous convictions and surveying contributing causes).

92. See *Goldman v. United States*, 245 U.S. 474, 477 (1918) (holding that the appellate court cannot invade “the province of the jury by determining questions of credibility and weight of evidence”). On the jury’s role as “lie detector” and credibility assessor, see generally George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575 (1997).

Moreover, part of what the jury may be better situated to do is to evaluate this evidence holistically in relation to the other evidence in the case. If the identification is corroborated by substantial other evidence, the jury can (and indeed should) consider this other evidence in assessing the identification. Conversely, if the experts teach the jury about how the characteristics of this identification reveal reasons for possible concern about accuracy, and the identification is in fact the only evidence in the case, the lack of other evidence coupled with the concerns about the eyewitness identification or confession could legitimately give the jury pause.

By contrast, typically admissibility decisions about a given item of evidence are made in a fairly atomistic manner;⁹³ it would be somewhat odd if a judge admitted an identification in a given circumstance because other nonidentification evidence also pointed toward the guilt of the perpetrator but would have excluded the same item of evidence without the corroboration.⁹⁴ To be sure, we do sometimes have corroboration requirements as a precondition for admissibility. But to assess reliability based partly on the strength of other evidence in the case goes against the typical grain of how judges make such decisions—and potentially creates significant dangers of cognitive bias as well.

The reality, then, is that judges simply do not have a legitimate basis for reaching reliability determinations about eyewitness identification or confessions in most circumstances—unless their concerns about reliability derive from concerns about the illegitimacy of the procedures by which the information was extracted. In some circumstances, judges could indeed endeavor to regulate these kinds of evidence by giving their *procedural* analyses more teeth. For example, suggestive behaviors by the police during interrogation or lineup could be grounds for exclusion—even without a “very substantial likelihood”⁹⁵ of error. Failure to adhere to social-science-based best practices for lineup design could also be grounds for exclusion. Similarly, failure to videotape the entirety of an interrogation

93. See Mirjan Damaška, *Atomistic and Holistic Evaluation of Evidence: A Comparative View*, in *COMPARATIVE AND PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN ON HIS SEVENTIETH BIRTHDAY* 91, 91–98 (David S. Clark ed., 1990) (suggesting the Anglo-American adversarial system has strongly atomistic tendencies, especially as compared to the Continental civil law systems); John Leubsdorf, *Presuppositions of Evidence Law*, 91 *IOWA L. REV.* 1209, 1213 (2006) (noting an “atomic” tendency as a characteristic of evidence law); Jennifer L. Mnookin, *Atomism, Holism, and the Judicial Assessment of Evidence*, 60 *UCLA L. REV.* 1524, 1531 (2013) (describing holism as the counterpoint to the default approach to admissibility).

94. There are some limited circumstances where judges do consider corroboration in assessing admissibility—for example, in the hearsay exception for statements against interest. *FED. R. EVID.* 804(b)(3)(B). For a discussion of corroboration in relation to the atomism and holism of judicial decision making in evidence, see Mnookin, *supra* note 93, at 1551.

95. *Manson v. Brathwaite*, 432 U.S. 98, 116 (1976) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

process could, unless exigent circumstances excuse the lapse, mean exclusion. As a matter of public policy, holding police accountable for their compliance with best practices is probably a sound idea. Moreover, in the aggregate this would presumably enhance reliability—the best practices are (or at least ought to be) designed precisely to maximize accuracy.⁹⁶ Rejecting evidence when these practices are not followed would strongly incentivize compliance by police and investigators—and presumably, this would also enhance the accuracy of the evidence permitted in court.

However, much of the research on eyewitness identification does not relate to police behavior. Estimator variables simply do not have anything to do with how the police behave in a lineup procedure. Regulating lineup design just does not speak to this dimension of the problem. In other areas, we may not know enough yet to insist upon best practices with confidence. There are, to be sure, some areas where we probably do have an adequate knowledge base to drive policy: for example, the benefits of blinding procedures during lineups, making certain that the officer interacting with a witness during a lineup does not herself know which individual is the suspect, in order to avoid purposely or inadvertently signaling that information to the witness and thereby biasing the response.⁹⁷ But for other aspects of lineup design we may not know enough to insist on specific process design as a *sine qua non* of admissibility. Even sequential lineups versus simultaneous lineups, a topic that has received much attention and study in recent years, remains sufficiently controversial that it would be hard to justify making a given design a requirement for admissibility.⁹⁸

Thus, while enhanced procedural scrutiny may be valuable, it will certainly not obviate the need for expert testimony on system variables, as well as the pros and cons of any given lineup design. Similar arguments hold sway for confession evidence as well—enhanced procedural requirements and enforcement via judicial exclusion if they are not followed may well be worthwhile and accuracy enhancing. But it is far from clear that the reliability of a given confession can be consistently assessed accurately by judges (or by experts themselves).

96. I am oversimplifying, here, in that accuracy is not simply one thing. Some methods might decrease false positives but also decrease true positives. Whether and to what degree we have a preference between type I and type II errors might affect how we evaluate best practices in the area. IDENTIFYING THE CULPRIT, *supra* note 2, at 86 n.43.

97. Wells et al., *supra* note 67, at 627.

98. See, e.g., Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459, 468–71 (2001) (concluding that sequential lineup procedure is generally superior to simultaneous but expressing reluctance to recommend its categorical adoption due to uncertainty in the practical application of the sequential procedure).

B. Jury Instructions

So far, we have seen that routinizing the use of psychological experts is simply not feasible given their cost and scarcity. Furthermore, I have suggested that attempting to regulate at the front end by implementing a robust reliability screen by judges has its own difficulties. What else then might we do? In the face of this dilemma, many courts, commentators, and scholars have argued that jury instructions could be a valuable substitute for expert testimony. If the key, central social findings could be presented succinctly to the jury through instructions, then access to this information could become far more widespread and fairly distributed among defendants.

For example, in a concurring opinion Seventh Circuit Judge Frank Easterbrook ruminated as follows about the powers of judges to incorporate science into how they operate their courts:

Similarly a judge, recognizing the main conclusions of the scholarly study of memory—that “accuracy of recollection decreases at a geometric rather than arithmetic rate (so passage of time has a *highly* distorting effect on recollection); accuracy of recollection is *not* highly correlated with the recollector’s confidence; and memory is highly suggestible—people are easily ‘reminded’ of events that never happened, and having been ‘reminded’ may thereafter hold the false recollection as tenaciously as they would a true one,” could block a lawyer from arguing that a given witness is *sure* of his recollection, and therefore is more likely to be right. The judge could inform jurors of the rapid decrease of accurate recollection, and the problem of suggestibility, without encountering the delay and pitfalls of expert testimony. Jurors are more likely to accept that information coming from a judge than from a scholar, whose skills do not lie in the ability to persuade lay jurors (and whose fidgeting on the stand, an unusual place for a genuine scholar, is apt to be misunderstood). Altogether it is much better for judges to incorporate scientific knowledge about the trial process *into* that process, rather than to make the subject a debatable issue in every case. There remains a question about where judges acquire scientific knowledge, for they too may be mistaken in what they think they know. Still, professional adjudicators who attend continuing judicial education programs and read the scholarly literature are more likely to absorb the lessons of science than are jurors force fed a little information during a trial.⁹⁹

For Easterbrook, instructions trump actual experts as a method of providing meta-information, or educational materials.¹⁰⁰ Instructions are

99. *United States v. Hall*, 165 F.3d 1095, 1120 (7th Cir. 1999) (citations omitted).

100. *Id.*

more authoritative.¹⁰¹ They are more efficient.¹⁰² They provide information in an across-the-board manner applicable to many cases, rather than treating it as a “debatable issue” over and over again.¹⁰³

This instruction-focused approach to some of the insights from the psychology of memory and perception is beginning to take hold in a few jurisdictions. Massachusetts,¹⁰⁴ Oregon,¹⁰⁵ and New Jersey¹⁰⁶ have all engaged in serious efforts to develop jury instructions that thoughtfully incorporate the scientific findings into digestible descriptions.

At first blush, this approach indeed seems promising. As Judge Easterbrook recognized, it is efficient and may well be seen by the fact finder as more neutral than had similar information been presented by a party via expert evidence. It is also inexpensive—it can be used at any trial at which it is relevant; unlike traditional expert testimony, it can easily be scaled up to meet demand. Indeed, some of those who have tepidly supported jury instructions have done so primarily because of the stark reality of the cost issues relating to experts that make it simply impossible to use them in their traditional form in all the cases in which they would legitimately be called for.¹⁰⁷

However, I would suggest that jury instructions are akin to using a Band-Aid on a head wound: perhaps better than nothing, but not the right solution to a serious problem. In practice, some jury instructions are disingenuous and misleading about the source of their authority. Others are more candid, but thereby reflect a kind of mistake in which that which is actually evidence is presented as instruction.

Some jury instructions—those I consider disingenuous—implicitly reference social-science findings but don’t recognize them as such. Consider the following suggested instruction on cross-racial identification:

In this case, the identifying witness is of a different race than the defendant. You may consider, if you think it is appropriate to do so, whether the fact that the defendant is of a different race . . . has affected the accuracy of . . . [an] identification. You should consider

101. *Id.*

102. *Id.*

103. *Id.*

104. See SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS IDENTIFICATION, REPORT AND RECOMMENDATIONS TO THE JUSTICES 3–4 (2013).

105. State v. Lawson, 291 P.3d 673, 685–88 (Or. 2012). See also Rebecca Brown & Stephen Saloom, *The Imperative of Eyewitness Identification Reform and the Role of Police Leadership*, 42 U. BALT. L. REV. 535, 546–47, 551–52 (2013) (explaining the Oregon and New Jersey Supreme Courts’ approaches to incorporating scientific findings into eyewitness identifications).

106. State v. Henderson, 27 A.3d 872, 924–25 (N.J. 2011).

107. IDENTIFYING THE CULPRIT, *supra* note 2, at 40–41. See also CRIM. JUSTICE SECTION, AM. BAR ASS’N, *supra* note 70, at 3–4 (noting the existence of just a “handful” of experts in Los Angeles and none in many rural areas and considering that in many areas it is a struggle to pay for attorneys, and it is simply inconceivable that judges will fund experts in the bulk of the cases).

that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race.¹⁰⁸

The serious problem with this instruction is that it locates the relevant source of knowledge undergirding its point in “ordinary human experience” rather than psychology or social-science research. It basically tells the jury members that if they have found in their ordinary experience that identifying people of other races can be harder, then they may consider that experience in their evaluation of the evidence in the case. But what if this is not the perceived experience of the jurors? What if they do not believe that they have found in their experience any difference in making identifications across race? In that circumstance, this instruction gives them absolutely nothing useful to work with. To whatever extent the point is actually counterintuitive, rather than consistent, with their lived experience the jury instruction becomes utterly irrelevant. This jury instruction recasts what are actually research findings¹⁰⁹ as common-sense intuitions—when they may not be common sense at all, but rather potentially discordant with the jury’s perceptions and intuition of the world.

The reason why some courts and commentators elect to use disingenuous instructions like this is because it makes them, in form, ordinary instructions. There is nothing wrong with alerting jurors to the possible need to consider matters that they have found based on their common sense and experience. So if their experiences formed the source of knowledge and belief for many jurors in assessing these questions—if it really were common sense—then this instruction would not be problematic. We might still wonder how much effect such an instruction would have—perhaps it would serve just as a reminder nudge of sorts to the jury to consider something that many of them already knew—but it would, at least as a formalistic matter, be quite legitimate.¹¹⁰ But if this information is not common sense—but rather the not-altogether-intuitive findings of social science—then to cast it as if it were common sense is misleading, indubitably a legal fiction, designed to get this information about cross-racial identifications in front of the jurors even if oddly cast.

108. CRIM. JUSTICE SECTION, AM. BAR ASS’N, *supra* note 70, at 4.

109. See IDENTIFYING THE CULPRIT, *supra* note 2, at 96–97 (describing the own-race bias).

110. There is a substantial literature on the effectiveness of jury instructions; overall, it suggests some skepticism about their effectiveness. In the eyewitness context in particular, there have been a handful of studies looking at the effectiveness of instructions on modifying juries’ attitudes and beliefs. For a review of these studies, see Richard A. Wise et al., *An Examination of the Causes and Solutions to Eyewitness Error*, 5 FRONTIERS PSYCHIATRY, art. no. 102, at 3–5 (2014), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4131297/pdf/fpsy-05-00102.pdf>, archived at <http://perma.cc/L3S4-KUBR>.

Recently, the state of New Jersey, which used to have an instruction similar to the one quoted above,¹¹¹ decided to take more radical steps. *State v. Henderson*,¹¹² after canvassing the scientific literature in substantial length, ended up deciding to require detailed jury instructions that reference scientific findings as their source.¹¹³ In 2012, New Jersey indeed promulgated new jury instructions, and these, unlike most of the predecessor instructions in New Jersey and elsewhere, explicitly located their authority in scientific research. Given the novelty of this approach, I will quote the instructions at some length:

Eyewitness identification evidence must be scrutinized carefully. Human beings have the ability to recognize other people from past experiences and to identify them at a later time, but research has shown that there are risks of making mistaken identifications. That research has focused on the nature of memory and the factors that affect the reliability of eyewitness identifications.

....

Relying on some of the research that has been done, I will instruct you on specific factors you should consider in this case in determining whether the eyewitness identification evidence is reliable. . . . Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.

In deciding what weight, if any, to give to the identification testimony, you should consider the following factors that are related to the witness, the alleged perpetrator, and the criminal incident itself.

....

Weapon Focus: You should consider whether the witness saw a weapon during the incident and the duration of the crime. The presence of a weapon can distract the witness and take the witness's attention away from the perpetrator's face. As a result, the presence of a visible weapon may reduce the reliability of a subsequent identification if the crime is of short duration. In considering this factor, you should take into account the duration of the crime because the longer the event, the more time the

111. See *Henderson*, 27 A.3d at 882–83.

112. 27 A.3d 872 (N.J. 2011).

113. *Id.* at 925–26, 928.

witness may have to adapt to the presence of the weapon and focus on other details.

....

Confidence and Accuracy: You heard testimony that (insert name of witness) expressed his/her level of certainty that the person he/she selected is in fact the person who committed the crime. As I explained earlier, a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification. Although some research has found that highly confident witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable indicator of accuracy.

....

Cross-Racial Effects: Research has shown that people may have greater difficulty in accurately identifying members of a different race. You should consider whether the fact that the witness and the defendant are not of the same race may have influenced the accuracy of the witness's identification.¹¹⁴

Notice the frequent and explicit references to research. On the one hand, this is a definite improvement compared to the numerous states that pretend that the appropriate epistemic authority for these inquiries is the jury's common sense and experience, when it is in fact nothing of the sort. These findings come from psychological research, and many of them are certainly not common sense (at least not yet). The New Jersey instructions do not disingenuously suggest otherwise and instead locate these concerns quite explicitly in the register of research and as findings of scientific inquiry.

While as a matter of epistemic legitimacy that approach is quite right, the problem is that it is both strange and inappropriate to instruct the jury about scientific findings in this manner in a criminal case. These research findings are not matters about which the court can legitimately take judicial notice—they are not actually adjudicative facts (the only sort which the relevant federal rule applies to)—and besides, in criminal cases, judicial notice is not binding upon the fact finder.¹¹⁵

The fundamental problem is that these matters are, in fact, *evidence*. They are not incontestable. They are not certain. They are also not findings

114. New Jersey Criminal Model Jury Instructions, *Identification: In-Court Identification Only* (July 19, 2012), available at http://www.judiciary.state.nj.us/pressrel/2012/jury_instruction.pdf, archived at <http://perma.cc/22Y2-SMV7> (emphasis omitted) (citations omitted). The new jury instructions were made available through a link from a press release. See Press Release, N.J. Courts, Supreme Court Releases Eyewitness Identification Criteria for Criminal Cases (July 19, 2012), available at <http://www.judiciary.state.nj.us/pressrel/2012/pr120719a.htm>, archived at <http://perma.cc/SJJ5-C3MX>.

115. FED. R. EVID. 201(f).

that are ideally reduced to a single sentence or two. Consider the instruction about confidence and accuracy. Essentially, the fact finder is told that science shows that confidence is not a reliable indicator of accuracy—except sometimes, when it is. This instruction invites any thinking person to ask further questions: Do we know when high confidence does in fact correlate with accuracy? In what circumstances? How often? And does lack of confidence correlate with lower-than-typical accuracy? The jury instruction, as a form for providing information, does not permit any genuine degree of exploration of these issues—they operate as gestures about some knowledge about some categories and nothing more.

By contrast, with an expert witness there is the chance to explore the research findings, their robustness, their blind spots, their degree of consistency or controversy, and so on. With an expert, the proffering party can offer significantly greater detail about the research findings and how strong they are. Similarly, the opposing party has a real opportunity to cross-examine the expert and to explore the limits of our scientific knowledge or its inapplicability to this case—and, if the party wishes, to call an expert of its own.

Out of a noble goal to reduce juries' reliance on erroneous eyewitness evidence, then, the state of New Jersey has made a category error: taking a set of issues that are properly understood as evidence and attempting to turn them into instructions instead. Although the instructions are reasonably detailed, considering that they are instructions rather than evidence, they nonetheless are unlikely to provide a jury with enough information to make an intelligent decision about the applicability of the research findings to a given case. The instructions say nothing about the strength or consistency of the research findings. They say nothing about the effect sizes of the various issues mentioned. To be sure, experts testifying do not always go into that degree of detail either—but expert testimony offers far more potential for educating the jury in a more thoughtful and nuanced way than a sentence or two on some of the hot-button items can.¹¹⁶

116. For a tepid endorsement of instructions as a second-best solution compared to experts, see IDENTIFYING THE CULPRIT, *supra* note 2, at 40–43. To be fair, with expert testimony as well there are questions of effectiveness and whether expert testimony actually modifies juries' behavior or understanding. Some studies do find that expert testimony produces greater skepticism about eyewitness identification, but whether it produces greater sensitivity to the differences in strength depending on particular qualities of the specific identification is far less clear. See, e.g., Michael R. Leippe & Donna Eisenstadt, *The Influence of Eyewitness Expert Testimony on Jurors' Beliefs and Judgments*, in EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 169, 184–86 (Brian L. Cutler ed., 2009) (discussing various studies conducted on whether expert testimony impacts jurors' willingness to believe eyewitnesses and determining that while expert testimony increases skepticism, such testimony may be discarded in favor of believing the eyewitness).

IV. In Defense of Modular, Repeat-Play Expert Testimony

Against this backdrop of plausible but problematic alternatives, I return now in my final Part to the possibility of modular testimony. This recent turn to jury instructions based explicitly on science should conceptually open the door to modular testimony as well. As I said at the outset, this category mistake reflects something important and relatively unusual about these kinds of evidence. They are in great part simply not case specific. The key social-science findings repeat in case after case.¹¹⁷ The framework, the science, the key research papers, the methodological strengths and weaknesses—these do not change from case to case. The specific variables at play in any given case can, of course, be different, but if the case involves a cross-race identification, an extremely short observation time, or a weapon, then the social science relevant to that is the same in Nebraska as in Nevada. To be sure, it may change and develop over time, but that is a matter of years, not days or weeks or months. This modularity and consistency of relevant information over cases is what makes jury instructions even quasi-thinkable as a method for providing the fact finder with information about these issues. And it is this same framework, repeat-play quality that makes modular, premade testimony a plausible alternative to our traditional, particularized, case-by-case use of an expert.

Therefore, at a minimum, I wish to argue that we should seriously consider adding this form of modular testimony to the available tools in our adjudicatory toolbox. It may (perhaps) be worse than expert testimony in its traditional live-and-in-person form, but the simple, undeniable reality is that many defendants never get access to such experts even in cases in which they are well warranted.

There are, to be sure, many design details that would need to be worked out and some complexities, practical and doctrinal, that modular testimony would have to overcome. Some of these are doctrinal—like how the modules would get around the hearsay rule, or the critical question of whether prosecutors could legitimately complain about having to accept a kind of substituted cross-examination in lieu of an opportunity to cross-examine the expert themselves. I would suggest that prosecutors have no legitimate cause for complaint, considering the symmetry of this proposal:

117. See, e.g., *State v. Guilbert*, 49 A.3d 705, 715 (Conn. 2012) (discussing proposed expert testimony on the impact of stress, time, and police interrogation techniques on the accuracy of eyewitness identifications); *Commonwealth v. Walker*, 92 A.3d 766, 773, 791 (Penn. 2014) (allowing expert testimony offered to show the phenomenon of weapon focus and the impact of stress and police tactics on eyewitness-identification accuracy); *State v. Clopten*, 223 P.3d 1103, 1105, 1118 (Utah 2009) (ruling to include expert testimony on factors impacting the accuracy of eyewitness testimony including “cross-racial identification, the impact of violence and stress during an event, the tendency to focus on a weapon rather than . . . facial features, and the suggestive nature of certain identification procedures used by police”).

while they are required to accept substituted cross-examination, the defendants are also accepting substituted direct examination. Given that prosecutors' rights to cross-examination are rooted in the due process clause, if the process of creating modules were nonpartisan and fair, why would due process be violated by this symmetrical reliance on substituted questioning? In this regard, it is worth noting that with the use of the social-science based jury instructions in New Jersey, the prosecutor has no opportunity at all to produce evidence questioning or suggesting limitations to what the research is said to show¹¹⁸—so substituted cross-examination would be significantly more informative than that baseline.

Clearly only the defendant could make the preliminary election for the use of modules because of the defendant's Confrontation Clause rights.¹¹⁹ It could be, however, that in some instances a prosecutor would wish to use a module as rebuttal evidence to show how certain risk-generating variables were not present in the case. Having elected to make use of modules herself, a defendant ought not to be able to prevent the prosecutor from doing the same, at least within the same general topic area. Mechanisms would have to be developed to make sure the modules were accurate and fair; one could imagine some kind of vetting of their content or some form of peer review, in addition to their production by and through organizations with nonpartisan reputations and substantial authority in the worlds of both science and law. It would also be appropriate to investigate the effects of video testimony on juror comprehension as compared with live expert testimony. Does the technologically mediated nature of the testimony affect its reception? If so, is it more persuasive or less so?

There are many questions, to be sure. But with vision and effort, there does not seem to me to be any insurmountable obstacle to producing and using this form of repeat-play testimony. The key point is that modular testimony could provide a valuable, ready-to-wear alternative: providing a practical, affordable, second-best solution to the great bulk of defendants for whom couture, in the form of the psychological expert hired for the particular case, is not a viable option.

Albeit tentatively, I might even go one step further. In certain respects, modular, premade testimony might actually be better than the traditional kind. Better how? It could certainly be less expensive and more widely available. In addition, the lawyers who conducted the premade testimony are likely to be more knowledgeable and more experienced than many—perhaps even most—of the defense attorneys and prosecutors who engage with this testimony in the usual way. These are significant advantages and ought not to be dismissed lightly.

118. *See supra* note 114 and accompanying text.

119. *See* U.S. CONST. amend. VI (guaranteeing the defendant in a criminal prosecution the right "to be confronted with the witnesses against him").

But even beyond these practical benefits, premade testimony for certain kinds of expert evidence might even be *epistemically* better—because through its in-advance, and therefore by necessity *generic* structure, modular testimony would limit and cabin the substance of the expert’s testimony in ways that are harder to achieve with live testimony. Testimony produced in advance of any given case cannot, by definition, reach any specific conclusions about that specific case. It can only speak to the general research findings: what they are, their robustness, their applicability, and their limits. It can speak hypothetically about some issues of inference—the degree to which, for example, tests conducted in laboratory settings may or may not be applicable to the more complex realities of the messier real world. But an expert is not a soothsayer; the produced-in-advance testimony designed to educate the fact finder about the relevant social-science findings cannot possibly answer or address whether any particular identification, or lineup procedure, or memory, or confession warrants belief by the fact finder.

To be sure, often psychological experts are very clear about their inability to make any case-specific judgments—as we saw in the transcript excerpts above.¹²⁰ But unsurprisingly, given their roles and their jobs, attorneys on both sides attempt to push against that boundary. Consider the following excerpt from a transcript of a psychological expert on eyewitness identification:

[MR. THERRIEN:] Okay. Let me pose some hypothetical questions to you.

Suppose a bank robbery takes place, the robber has a gun which he brandishes and which is clearly visible to all the witnesses. Immediately after the robbery, the witness to the robbery identifies a photo of a suspect as the robber. Based on the pictures of the actual robber from the bank surveillance system, the suspect identified by the witness doesn’t look very much like the actual robber.

Say a period of time later, say a year later, the witness claims to remember the robber being a bank customer she knows both by appearance and by voice[.] What would you conclude about the reliability of the witness’s second identification, the one of the known customer?

MS. KIRK: Objection. Invades the province of the jury.

THE COURT: Sustained.

MR. THERRIEN: Judge, can we be at side bar just for a second.

THE COURT: All right.

120. See *supra* notes 84–87 and accompanying text.

(AT SIDEBAR:)

MR. THERRIEN: I think an expert can testify as to the information that he has before him in hypotheticals.

THE COURT: The problem is, in my mind—well, let me hear from the government.

MS. KIRK: It's too close to the facts. If it was just—he can testify to the theories, and they apply the theories to the facts.

THE COURT: The problem that I perceive is you cannot possibly put in all of the perceptions that were ongoing. For example, the one lady sitting at a desk looking at the man directly sees a firearm that looks like, she calls it a revolver. Whether it's a revolver or pistol, we don't know. I also think that it basically is an opinion on guilt or innocence, or gets awfully close to guilt or innocence, which is a fact that the trier of fact has to determine.

I also think that you have, at this point, all of the principals of learning that are available that the jury can use, but to then ask the hypothetical where he has not seen any of the evidence, or if he has, it's been replicated after the event, puts him in a position of making—providing an opinion which really does invade the province of the jury. That's my reaction.

MR. THERRIEN: Okay. Well, I was just—I didn't ask him about Michelle Rhode.

THE COURT: No, I know that.

MR. THERRIEN: I was just asking him under that hypothetical. So I'm not allowed to ask him any hypotheticals?

THE COURT: No, I didn't say that. But at least that hypothetical would not be applicable.¹²¹

We see here the defense attorney making a valiant effort to ask the expert about the array of key indicators in the case—as a hypothetical question—and wanting the expert to opine about reliability on that basis. The prosecutor and the court both resist this effort to engage in such a specific, concrete manner. They articulate both that the hypothetical is incomplete compared to the events itself, and that it also invades the province of the jury by being too close to the facts—it is at once too specific and incomplete. The court suggests that what the jury really should gain from the expert are “principles of learning” rather than this form of direct opinion on a version of the facts of the case.¹²² Interestingly, neither the judge nor prosecutor articulates the argument in the sidebar that, in fact, the expert lacks adequate *expertise* to opine on that kind of hypothetical, but

121. Transcript of Record at 23–25, *United States v. Gipson*, 2008 WL 8762440 (E.D. Wash. July 23, 2008) (No. CR-07-2056-LRS-1).

122. *Id.* at 25.

that argument would have been legitimate as well, since the form that psychological knowledge about eyewitnesses takes does not permit moving from the general to the reliability of the individual's identification on the basis of the science alone.¹²³

The point is that, as this example suggests, there may sometimes be pressure on experts to go beyond the realm of the research findings and what they can legitimately indicate about risk factors. Experts may be asked—and sometimes may be willing—to opine in a more specific manner. If we think that experts ought to remain firmly in the framework setting, offering only meta-expertise without any case-specific commentary, then modular testimony may even offer advantages compared to traditional testimony. To whatever extent those limitations on experts are both valuable and not always easily or completely adhered to under the adversary pressures and the bustle and immediacy of the trial process, then modular testimony offers the added benefit of enforcing these limits through its structural form. Moreover, the fact that modular testimony is, by necessity, less “tailored” may even enhance its credibility with the fact finder, because the jury would know the expert was not part of the defense ‘team’.¹²⁴

Where, then, are we left? In short, if we wish to hew firmly to this boundary line between the specific and the general, modular, repeat-play evidence provides a useful method for ensuring experts’—and attorneys’—adherence. From this perspective, modular testimony may actually be better than traditional live testimony, precisely because of the way that it structurally enforces the boundary between the specific and the general.

By contrast, if we believe that experts can and should sometimes offer more specific evaluations of the applicability of the social science to the particular case—or the inapplicability of some findings to the specific case—then modular testimony pales in comparison to the more traditional

123. See Christian Sheehan, Note, *Making the Jurors the “Experts”: The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. REV. 651, 688 (2011) (“A court is especially likely to disallow an expert’s testimony if it appears that the expert is commenting on the reliability of a specific witness in the case.”).

124. With modular testimony, the fact finder would presumably understand that the expert was not a partisan, hired by the specific party, and potentially shading and tailoring his or her testimony specifically for that particular trial. With the typical expert, not only is there a risk of partisanship, given adversarial pressures and the dynamics of “team” membership, but there is the related-but-distinct concern that a jury needs to assess the expert’s partisanship and assess credibility in light of it. In other words, with case-specific experts, the fact finder must determine credibility while recognizing that the expert has been hired by a particular party and that his or her testimony may be affected by this role. With modular testimony, the expert was not hired by any party in particular. His or her role is more thoroughly that of a social scientist providing information about relevant research. This lack of case-specific tailoring might make his or her ready-to-wear testimony more reliable and, perhaps, more credible as well. Thanks to Jaci Seelagy for helpful discussions on this point.

form.¹²⁵ In that case, modular testimony would be a second-best solution, to be sure, but it would still be far more institutionally appropriate than a strong judicial reliability test, far more detailed and informative than a set of jury instructions, and far less costly than a traditional expert.

Whether modular expert evidence is a second best solution or in some ways an improvement to our traditional approach to experts, the key point is that either way, it deserves to be taken seriously as a potential tool in our evidentiary toolbox. The regular use of modular, repeat-play testimony would expand access to knowledge about the limits of eyewitness identification and the risk factors for false confessions far beyond the lucky few who currently get access to live expert witnesses. And, precisely because it is still testimony, premade modules would provide this information in a more accurate and thoughtful way than jury instructions can ever do. There are, to be sure, practical and doctrinal difficulties that would have to be overcome, but these are only insurmountable if we elect to be so hidebound that we make them so. It is high time, then, for us to supplement our current couture approach to expert framework testimony with a viable ready-to-wear alternative.

125. For example: could an expert legitimately opine that a lineup design was so flawed as to be unreliable? This might be more legitimate, scientifically, than an opinion that a particular eyewitness was mistaken. In the former case, the expert would not be opining on the identification itself from the lineup, but on the legitimacy of the lineup method used given what the research has shown. This issue may be significant on cross too, where a prosecutor might want to ask specifically about the factors *not* present in the given case. Clearly modular testimony makes this kind of inquiry challenging—though the prosecutor could potentially make the same point through her own use of modules about the factors that assist reliability combined with effective use of argument.